U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 March 2007

In the Matter of
J. F. G.
Claimant
v.

CLINCHFIELD COAL CO.,
Employer

Case No. 2005-BLA-06280

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:[1]
Joseph E. Wolfe, Esquire
Claimant
Timothy Grisham, Esquire
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

DENIAL OF BENEFITS

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Claimant June 13, 2005. Director's Exhibit ("DX") 43.

Claimant was last employed in coal mine work in the state of Virginia, the law of the United States Court of Appeals for the Fourth Circuit controls. See ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

The initial claim was filed on April 27, 1995 (DX 1-1). The Department of Labor issued an initial determination of eligibility on July 2, 1996 (DX 1-24). Following Clinchfield Coal Company's request for and a hearing, Judge Richard Morgan denied benefits on October 27, 1997, because the evidence established neither the existence of pneumoconiosis nor any other respiratory or pulmonary condition related to coal mine

[1] The Director, Office of Workers' Compensation Programs, was not present nor represented by counsel at the hearing.

employment (DX 1-26, 33, 35, 42, 53, 55). Claimant appealed (DX 1-56). On March 31, 1999, the Benefits Review Board affirmed (D-60).

On August 23, 1999, Claimant submitted additional evidence and filed a request for modification (DX 1-61). The District Director denied the request on November 17, 1999. Claimant submitted additional evidence, and the District Director issued a Proposed Decision and Order Denying Request for Modification on March 21, 2000 (DX 1-65, 69). The Claimant appealed and requested a formal hearing on March 28, 2000 (DX 1-70). A hearing was scheduled before Judge Edward Terhune Miller but the Claimant requested a decision "on the record" waiving his right to an oral hearing. On February 22, 2002, Judge Miller determined that the Claimant failed to establish any of the outstanding medical elements in the prior record, i.e. pneumoconiosis, and that modification was not established. DX 1.

The Claimant filed the present claim for black lung benefits on May 21, 2004. DX 3. The Department of Labor ("DOL") identified Clinchfield Coal Company ("Clinchfield") as the potentially liable operator. DX 22. On May 11, 2005, the District Director issued a Proposed Decision and Order ("PDO") denying benefits, ruling that the Claimant had failed to prove he had pneumoconiosis or total disability due to pneumoconiosis. After the Claimant requested a hearing, the claim was referred to the Office of Administrative Law Judges. A hearing was held on March 14, 2006 in Abingdon, Virginia.

Forty eight Director's Exhibits (DX 1-DX 48) were admitted into the record for identification. See transcript, "TR" 5. Two Claimant's Exhibits ("CX" 1- CX 2, TR 10) and two Employer's exhibits ("EX" 1 – EX 2, TR 19-20) were also admitted.[2] Post hearing, the Employer submitted a brief; the Claimant did not.

The Claimant is now 64 years of age (DX 3). I noted for the record that he was wheelchair bound. TR 12, 16 17. He also wore an oxygen device, prescribed by Dr. McVey. Id. 17. He worked in deep underground mining, and has at least 25 years of coal mine employment, but alleges 31. Id. 13-14. Although he was a section foreman, he had to perform heavy jobs on occasion. Id. 14. He last worked in 1993. Id. 15.

The Claimant was treated by Dr. Rasmussen. Id. 16-16. He was asked how long he had been a smoker. He started about 1962 and quit 13 years prior to hearing. Id.

The record reflects that Claimant had been a section foreman as of 1972; prior to that time, he was a continuous miner operator (DX 1- 2). In a work history form filed in conjunction with his previous claim, the Claimant described the duties of his job as section foreman as, "fire boss, clean area with scoop, operate equipment to fill in for workers, maintain and repair equipment, rock dust, etc." This work required him to stand from eight to ten hours per day and lift forty to one hundred pounds twenty times per day. (DX 1-8). At the hearing before Judge Morgan, Claimant described his job as section foreman as follows, "enter the face, I make all gas checks, run my center lines and go from the miner to the roof bolter. Most of the time I stay with the miner." (DX 1-53 at 14-15). He kept the section clean and filled in for jobs when they were short on men (DX 1-53 at 15). The Claimant considered the work hard physically, and worked ten hour shifts, five to six days per week (DX 1-53 at 15-16).

[2] They were initially marked as EX 5 and EX 6, but I refer to them as EX 1 and EX 2. Employer continued to refer to them as EX 5 and EX 6 in the brief.

The record shows a conflict in the description of the smoking history . On February 10, 1995, Claimant reported a smoking history of twenty-five years at a rate of one and one-half packs of cigarettes per day, having quit two years before, which would be 1993 (DX 1-47, 48). The Claimant informed Dr. Forehand, on May 8, 1996, that he smoked one pack of cigarettes per day from 1976 to 1990 (DX 1-15). On September 11, 1996, Claimant informed Dr. Sargent that he smoked one-half pack of cigarettes per day for fifteen years, and quit seven years prior to the examination (DX 1-31). At the hearing for his original claim, the Claimant testified that he was a former smoker, but could not recall when he began smoking. However, he believed that he started smoking while in his twenties, and stated that he quit smoking on April 5, 1990 (seven years prior to the hearing). Claimant did not recall telling anyone that he still smoked in 1992 or 1993 or later. (D-53 at 23-26). On June 25, 1999, Claimant underwent pulmonary function testing pursuant to his examination by Dr. Robinette. The pulmonary function testing report indicated that the Claimant smoked cigarettes for twenty-five years, quitting four years prior to the examination, in 1995 (DX 1-63). On October 23, 2000, Claimant informed Dr. Hippensteel that could not remember how much he smoked, but knew that he quit in 1993, and may have begun smoking while in his late thirties.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989).

This case represents an initial claim for benefits. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director***, OWCP, 9 B.L.R. 1-65 (1986) (en banc). ***See Mullins Coal Co., Inc. of Virginia v. Director***, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director***, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The Claimant is a "miner" as that term is defined by the Act, and has worked after 1969. TR 8.

3. The Employer agreed that the Claimant had 25 years of coal mine employment. TR 6.

4. Clinchfield Coal Company is the responsible operator. TR 9.

5. The Claimant has one dependent. TR 8-9.

After a review of the stipulations and the record, they are accepted.

REMAINING ISSUES

1. Whether the miner suffers from pneumoconiois.
2. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled from a respiratory condition. In the prior decisions, Judges Morgan and Miller found claimant had a disabling respiratory

impairment, but that claimant failed to prove he had pneumoconiosis or was disabled due to pneumoconiosis.

4. Whether the miner's total disability is due to pneumoconiosis.

SUBSEQUENT CLAIMS

After the expiration of one year from the denial of benefits, the submission of additional material or another claim is considered a subsequent claim and adjudicated under the provisions of 20 C.F.R. § 725.309(d). That subsequent claim will be denied unless the claimant can demonstrate that at least one of the conditions of entitlement upon which the prior claim was denied (applicable condition of entitlement) has changed and is now present. 20 C.F.R. § 725.309(d)(3). If a claimant does demonstrate a change in one of the applicable conditions of entitlement, then generally findings made in the prior claim(s) are not binding on the parties. 20 C.F.R. § 725.309(d)(4). Consequently, the relevant inquiry in a subsequent claim is whether evidence developed after the prior adjudication supports a finding of a previously denied condition of entitlement.

To receive black lung disability benefits under the Act, a claimant must prove four basic conditions, or elements, related to his physical condition. First, the miner must establish the presence of pneumoconiosis.[3] Second, if a determination has been made that a miner has pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment.[4] Third, the miner has to demonstrate he is totally disabled. This has been established. And fourth, the miner must prove the total disability is due to pneumoconiosis. Based on those four principal conditions of entitlement, the adjudication of a subsequent claim involves the identification of the condition(s) of entitlement a claimant failed to prove in the prior claim and then an evaluation of whether, through newly developed evidence, a claimant is able to now prove the condition(s) of entitlement.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[5] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[6] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[7]

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[3] 20 C.F.R. § 718.202.

[4] 20 C.F.R. § 718.203(a).

[5] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[6] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[7] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

TIMELINESS

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

The Employer does not contest this issue.

I have reviewed all of the evidence in the record and nothing has been proffered to rebut the presumption.

CURRENT MEDICAL EVIDENCE SUMMARY

X-rays

EX No.	Physician	Qual	Date	Reading
DX 14	Patel	B/BCR	8/26/04	2/3 "B"[8]
CX 2	Scott	B/BCR	"	Negative
DX 38	Wheeler	B/BCR	12/2/04	Negative
CX 2	DePonte	B/BCR	"	1/1 "B"
CX 1	DePonte	B/BCR	1/10/06	1/2 "B"
EX 1	Scatarige	B/BCR	"	Negative
EX 2	Wheeler	B/BCR	2/8/06	0/1

Pulmonary Function Studies

Exhibit No.	Physician	Date of study	Tracings present?	Flow-volume loop?	Broncho-dilator?	FEV1	FVC/ MVV	Coop. and Comp. Noted?
DX 14	Rasmussen	8/26/04	Yes	Yes	No	0.77	1.97	Valid[9]

[8] This x-ray was read by Dr. Shiv Navani, B/BCR, for quality purposes. DX 17. He noted excellent film quality.

[9] This was read by J. Michos, M.D., board certified in internal medicine and pulmonology, for quality purposes only. DX 18. He found the testing results appear to be valid.

DX 38	Hippensteel	12/02/04	Yes	Yes	No	0.76	1.81	Invalid

Arterial Blood Gas Tests

Exh. No.	Physician	Date of Study	Altitude	Rest(R) Exer(E)	PCO2	PO2	Comments
DX 14	Rasmussen	11/4/04	0-2999	R	35	81	
DX 38	Hippensteel	12/2/04	"	R	31.1	88.1	
EX 2	Castle	2/8/06	"	R	36.7	67.8	

Medical Reports

Rasmussen, M.D.

Dr. Rasmussen performed a pulmonary evaluation for the Department of Labor. (DX 14). He obtained an occupational and patient history and performed a physical examination. Dr. Rasmussen reported that the Claimant has a significant history of exposure to coal mine dust. He has x-ray changes consistent with pneumoconiosis, complicated, Category B. It is medically reasonable to conclude the patient has complicated coalworkers' pneumoconiosis, Category B, based in large part on records from the patient's treating pulmonologist which indicates x-ray and CT scan readings consistent with complicated pneumoconiosis which arose from his coal mine employment.

Hippensteel, M.D.

On December 2, 2004, Dr. Hippensteel performed a pulmonary examination at the Employer's request. (EX 1). He determined that the Claimant's pulmonary impairment is not related to coal dust exposure, but is due to many years of cigarette smoking and to his bullous emphysema, unrelated to coal mining employment. He testified to a reasonable degree of medical certainty that claimant did not have coal workers' pneumoconiosis; did not have any lung condition that would show up on x-ray as an abnormality greater than one centimeter in diameter and is classified as Category A, B, or C in the ILO system; and did not have any chronic dust disease of the lung related to or aggravated by coal dust exposure. He specifically stated the abnormalities seen on claimant's chest x-ray and CT scan were related to sarcoidosis and to bullous emphysema, conditions unrelated to coal dust exposure and coal mine employment. Finally, he testified that claimant would have the same type and degree of lung disease and impairment had he never been exposed to coal dust.

Castle, M.D.

On February 8, 2006, Dr. Hippensteel performed a pulmonary examination at the Employer's request. (EX 2). Dr. Castle opined that claimant did not have coal workers' pneumoconiosis and that his pulmonary impairment was neither related to nor aggravated by coal dust exposure. He related claimant's impairment to tobacco smoke aggravating bullous emphysema with an asthmatic component. He stated the abnormalities seen on chest x-ray and CT scan were due to significant granulomatous disease, which was cavitating as shown on a November 23, 2005 CT scan. He also noted the masses showed significant calcification. He concluded that claimant had no evidence of coal workers' pneumoconiosis nor any evidence of a chronic dust disease of the lung related to or aggravated by coal dust exposure.

In his deposition, Dr. Castle stated that one of the abnormalities that some physicians determined was complicated pneumoconiosis was actually a cavitary lesion. He testified that

cavitation does not occur in a solid mass such as a mass or lesion of complicated coal workers' pneumoconiosis or due to coal dust exposure.

"Other" Medical Evidence

The Claimant did not designate any "other" medical evidence. The Employer submitted four CT scan readings: Dr. Hippensteel reviewed CT scans dated June21, 2001, March 31, 2004 and December 2, 2004. DX 38. Dr. Castle reviewed a scan dated November 23, 2005. EX 2. All are read as negative for pneumoconiosis. However, significant lesions are noted and a diagnosis of emphysema is rendered by Dr. Hippensteel and granulomatous is noted by both readers.

Medical Records

Emory Robinette, M.D.

The Claimant submitted as office notes records from Dr. Robinette dated March 23, 2003 and May 10, 2004, both which reference x-rays and a CT Scan that shows a mass in the right apex containing multiple foci measuring 5.1 x 2.9 cm. in the first report and 3.9 x 5.1 cm. in the second. Dr. Robinette opined in both records that the Claimant has complicated pneumoconiosis, a moderately severe obstructive pulmonary disease, and is treated by Severent, Atrovent and Combivent. DX 13.

FINDINGS OF FACT

TOTAL DISABILITY

To receive black lung disability benefits under the Act, a claimant must establish total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204(b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204(b)(1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills.

Both Judges Morgan and Miller determined that the Claimant has established total disability. All of the medical reports, including the Employer's physicians, Drs. Hippensteel and Castle, find that the Claimant is totally disabled from a respiratory standpoint. The Employer acknowledged in the brief that total disability exists in this record.

I will address below whether the record contains sufficient evidence that Claimant has complicated pneumoconiosis. There is no evidence of cor pulmonale with right sided congestive heart failure. As a result, the Claimant must demonstrate total respiratory or pulmonary disability through pulmonary function tests, arterial blood-gas tests, or medical opinion.

All of the recent medical reports accept and the record shows that Claimant has established total respiratory disability.

Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine

employment.[10] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[11] The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-ray Evidence

The record I consider under the rules for limitations on evidence involves seven readings of four x-rays in the current record. Three readings are positive. All of the readings were preformed by board certified radiologists. In the record before Judge Morgan, of thirty-two x-ray interpretations of nine x-ray films taken from April 1992 through March 1997, only three readings were positive for pneumoconiosis. In the record before Judge Miller, the Employer submitted three re-readings of a March 25, 1997 film that had been submitted in Judge Morgan's record. Drs. Castle and Hippensteel, both B-readers, read the film as 0/1 and noted tuberculosis and calcified granulomata (DX 1-67). Dr. Dahhan, also a B-reader, read the film as completely negative. The newly submitted June 25, 1999 film was interpreted positive by both Dr. Robinette, a B-reader, who also noted expansion of the lungs and pulmonary fibrosis, and Dr. McLeod, a dually qualified board-certified radiologist and B-reader (DX 1-61, 68). Dr. McLeod also noted the presence of granulomas and a fractured rib (DX 1-68). To the contrary, Drs. Wheeler and Scott, both dually qualified board-certified radiologists and B-readers, and Dr. Fino, a B- reader, interpreted the film as negative for pneumoconiosis (DX 1, EX -1, 2, 3). All three physicians noted the presence of granulomatous changes/granulomas, and Drs. Wheeler and Scott noted emphysema, fractured ribs, and tuberculosis. Claimant also submitted an x-ray dated April 26, 2000, and interpreted by Dr. Robinette as positive for pneumoconiosis, emphysema, and fractured ribs (DX 1, CX-4). Dr. Robinette also noted the possibility of an early category A mass; but, he did not make a finding of complicated pneumoconiosis by checking the appropriate box on the ILO form. Drs. Wheeler, Scott and Fino reviewed the April 26, 2000 film, and all read it consistently with their individual interpretations of the June 25, 1999 film (DX 1, EX 5, 6, 7). Employer submitted four readings of the October 23, 2000 film taken in conjunction with Dr. Hippensteel's examination of the Claimant. Dr. Hippensteel interpreted the film as negative for pneumoconiosis, 0/1, and positive for emphysema, calcified granulomas with linear scars (DX 1, EX-8). Drs. Wheeler, Scott, and Fino again provided interpretations consistent with their prior individual findings (DX 1, EX-10, 11). This pattern of x-ray interpretations corroborates the x-ray readings of the prior claim. Four films were interpreted sixteen times, and the majority of physicians were in accord that the films

[10] 20 C.F.R § 718.201(a).
[11] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

were negative for pneumoconiosis, but positive for granulomatous diseases, like tuberculosis, and emphysema. Moreover, the only dually qualified board-certified radiologist and B-reader to interpret an x-ray as positive for pneumoconiosis, Dr. McLeod, did not have the benefit of reviewing a series of films, but did note the presence of granulomas. Judge Miller determined that Dr. Robinette did not note the presence of granulomas/granulomatous disease. The Decision and Order set forth: "Accordingly, because this newly submitted radiographic evidence does not differ qualitatively from the evidence in the previous claim, Claimant has not established the existence of pneumoconiosis by a preponderance of the x-ray evidence." DX 1.

Biopsy and Presumption

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence. The presumption regarding complicated pneumoconiosis will be discussed below.

Medical Reports

20 C.F.R. § 718.202(a)(4) sets forth:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

The Claimant offers medical reports by Drs. Rasmussen who diagnosed coal workers' pneumoconiosis. The Employer relies on the reports of Drs. Hippensteel and Castle who do not.

Rationale

As jurisdiction vests in the Fourth Circuit, the presence of pneumoconiosis is based on weighing all types of evidence under 20 C.F.R. § 718.202 together. ***Island Creek Coal Co. v. Compton***, 211 F.3d 203 (4th Cir. 2000). Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[12]

The weight I must attribute to the x-rays submitted for evaluation with the current application are in dispute. "[W]here two or more X-ray reports are in conflict…consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 718.202(a)(1). I am "not required to defer to…radiological experience or…status as a professor of radiology." ***Dempsey v. Sewell Coal Co***., 23 BLR 1-47 (2004).

I have reviewed all of the material from the prior file, DX 1, and use them for background, but note that as pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. ***Clark v. Karst-;Robbins Coal Co***., 12 B.L.R. 1-;149 (1989)(en banc); ***Casella v. Kaiser Steel Corp.***, 9 B.L.R. 1-;131 (1986). I do not find a mistake of fact in the prior record.

In the current record, I note that of seven readings of four x-rays, the majority are negative. The Board has held that I am not required to defer to the numerical superiority of x-ray

[12] 20 C.F.R § 718.201(a).

evidence, ***Wilt v. Wolverine Mining Co***., 14 B.L.R. 1-70 (1990), although it is within my discretion to do so, ***Edmiston v. F & R Coal Co***., 14 B.L.R. 1-65 (1990). See also ***Schetroma v. Director, OWCP***, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies); ***Tokaricik v. Consolidation Coal Co***., 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease).

After a review of the record, I find that the Claimant has not established pneumoconiosis by the x-ray evidence. The majority of readings are negative, but all report that there are large lesions. I note that Dr. Hippensteel performed blood testing that establishes a diagnosis, at least in part, of sarcoidosis, via blood testing, which may be a viable basis for the presence of lesions on the CT scans.

The Claimant had the option of designating Dr. Robinette's "records" as medical reports. The Employer did not object to the admission of the records.[13] However, I note that Dr. Robinette premised his diagnosis in large part of the reading of CT scans. Because CT scans are not evidence proscribed by the statute, in order to validate them, the proffering party must provide evidence to support a finding under 20 CFR § 718.107(b) that the test or procedure is "medically acceptable and relevant to entitlement." ***Webber v. Peabody Coal Co***, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring).[14] The Claimant did not do so.

Likewise, in rendering a diagnosis of pneumoconiosis, Dr. Rasmussen relies heavily on the CT scans and readings by Dr. Robinette. In reading his report, he assumes that clinical pneumoconiosis has been established and does not discuss the elements of legal pneumoconiosis. He does note that there were two bases for a finding of total disability, coal dust exposure and cigarette smoking, but he does not explain how pneumoconiosis is established. DX 14.

Dr. Hippensteel testified by deposition that he received training during his pulmonary fellowship in the interpretation of CT scans relating to lung disease and that he has taken further training in that process. He also testified that he reviews and interprets CT scans for his pulmonary patients on a daily basis and that the use of CT scans is becoming an ever more used diagnostic tool in pulmonary medicine. EX 2 at 12-13. He also testified that CT scans are accepted by the medical community and are relevant to determining the existence or nonexistence of diseases due to coal dust exposure. EX 2 at 12.

Although I find that CT evidence has been established as valid, I can not accept that the CT scans read by Dr. Robinette have been validated and that they lead to a conclusion that complicated pneumoconiosis has been established by CT scan or by x-ray. Dr. Robinette does not describe by date or facility the CT scans on which he relies and does not indicate whether he considered any other etiologic factor other than coal dust exposure. Additionally, the record contains no evidence that Dr. Robinette has any specialized knowledge, training or experience in interpreting CT scans for pneumoconiosis. Moreover, they were not even designated as "other" evidence for evaluation.[15]

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[13] In ***Stamper v. Westerman Coal Co***., BRB No. 05-0946 BLA (July 26, 2006) (unpub.), the Board held that a treatment note is not a report under § 725.414(a)(4). Therefore it should not qualify as a "reasoned medical opinion".

[14] ***Webber*** differs from the Board's earlier decision in ***Dempsey v. Sewell Coal Co***., 23 B.L.R. 1-47, 1-59 (2004)(en banc), which held that the evidentiary limitations did not apply to "other medical evidence" under § 718.107 such as CT-scans. See also ***Harris v. Old Ben Coal Co***., 23 B.L.R. 1-98 (2006)(en banc)(J. McGranery and J. Hall, concurring and dissenting).

[15] Again, see ***Stamper v. Westerman Coal Co***., *supra*. If it is not so designated, how can the Claimant rely on it as the basis for a reasoned medical opinion?

A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. ***Fields v. Island Creek Coal Co.***, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. ***Hoffman v. B&G Construction Co.***, 8 B.L.R. 1-65 (1985).

Although the Claimant has submitted a well documented record, he has not submitted a reasoned basis for a determination that pneumoconiosis has been established. I can not accept that clinical or legal pneumoconiosis has been rationally explained.

CAUSATION

As pneumoconiosis is not established, this issue is moot.

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Claimant needs to establish that pneumoconiosis is a "substantially contributing cause" to his disability. As pneumoconiosis is not established, this issue is moot.

CONCLUSION

In summary, although the Claimant has established total disability, I find that the Claimant has failed to establish pneumoconiosis, a required element of proof. ***Oggero v. Director, OWCP,*** *supra.* As a result, because this is an initial claim, there is no need to evaluate the remainder of the issues. He has failed to prove that one of the applicable conditions of entitlement has changed since his prior claim became final. 20 CFR § 725.309(d). Therefore, his claim for benefits is denied.

ORDER

It is ordered that the claim of **J. F. G.** for benefits under the Black Lung Benefits Act is hereby **DENIED**.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).